95-1666

Supreme Court, U.S.
FILED
APR 15 1996

No. 95-_____

IN THE

Supreme Court of the United States

October Term, 1995

BABCOCK & WILCOX COMPANY,
Petitioner,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SAN FRANCISCO,
Respondent.

MATSON NAVIGATION COMPANY, INC., WATTERS MARINE, INC., WEYERHAEUSER COMPANY (IMPROPERLY NAMED AS F.E. WEYERHAEUSER), HEUBLEIN, INC. (AS SUCCESSOR IN INTEREST TO UNITED VINTNERS, INC.), AMERICAN PRESIDENT LINES, LTD., AND MOBIL OIL CORPORATION
Real Parties In Interest For Respondent

Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

BROWN, SIMS, WISE & WHITE
One Post Oak Central
2000 Post Oak Boulevard
Suite 2100
Houston, Texas 77056-4496

KENNETH G. ENGERRAND
Counsel of Record
2000 Post Oak Boulevard
Suite 2100
Houston, Texas 77056-4496
(713) 629-1580

Attorney for Petitioner,
Babcock & Wilcox Company

QUESTIONS PRESENTED FOR REVIEW

1. Whether Nonsettling Defendants In Maritime Cases Can Avoid The Ruling Of This Court In *Boca Grande Club, Inc. v. Florida Power & Light Co.*, Which Bars Contribution Actions Against Settling Parties, By Bringing Common-Law Indemnity Actions Against The Settling Parties?

2. Whether The Proportionate Share Rule Adopted In *McDermott, Inc. v. AmClyde* Should Be Uniformly Applied In All Maritime Cases Or Whether Exceptions Should Be Engrafted Onto The Rule To Permit Defendants To Pursue Claims For Implied Contractual Indemnity And Equitable Indemnity?

LIST OF PARTIES

1. Petitioner, Babcock & Wilcox Company. Pursuant to Rule 29.6, Petitioner states that Babcock & Wilcox Company is a subsidiary of McDermott International, Inc., McDermott Incorporated and Babcock & Wilcox Investment Company. The following entities are partially but not wholly owned by Babcock & Wilcox Company: ASEA Babcock, Babcock & Wilcox Services, Inc., Diamond Power Specialty Limited, KBW Gasification Systems, Inc., North American CWF Partnership, North County Operations Associates, Palm Beach Energy Associates, and South Point CWF.

2. Respondent, Superior Court of the State of California, County of San Francisco.

3. Real Parties in Interest for Respondent, Matson Navigation Company, Inc., Watters Marine, Inc., Weyerhaeuser Company (improperly named as F.E. Weyerhaeuser), Heublein, Inc. (as successor in interest to United Vintners, Inc.), American President Lines, Ltd., and Mobil Oil Corporation.

4. Other parties in the Superior Court below, Plaintiff, Abdel H. Osman, who is now deceased, Defendants, Pope & Talbot Co., Halcyon Steamship Co. Inc., ISCO Inc., Successor to Isthmian Lines, Pacific Coast Transport Co., Hendy International Co., Intercoastal Bulk Carriers, Inc., West Coast Shipping, A-C Product Liability Trust, Acands, Inc., ARGO International Corp., Armstrong World Industries, The Auburn Mfg. Co., Bethlehem Steel Corp., A.B. Boyd Co., Inc., Certainteed Corp., Champion International, A.W. Chesterton Co., Coltec Industries, Inc.,

Combustion Engineering, Inc., Alfred Conhagen, Inc., Crane, Crosby Steam & Valve Co., Crown, Cork & Seal Co., Inc., Dana Corp., Dover Resources, Inc., Dresser Industries, Inc., Harbison-Walker Div., Durabla Manufacturing Co., Durametallic Corp., EG&G Sealol Inc., Elliott Turbomachinery Co., Inc., Excelsior, Inc., Federal-Mogul Corp., Fel-Pro, Inc., FKI Industries, Inc., Flexitallic, Inc., Flintkote Co., Foster Wheeler Co., GAF Corp., General Cable Co., General Electric Co., General Refractories, General Signal Corp., Aurora Pump Division, Goodall Rubber Co., B.F. Goodrich, Goodyear Tire & Rubber Co., Goulds Pumps, Inc., A.P. Green Industries, Inc., Greene Tweed & Co., Hajoca Corp., IMO Industries, Inc., Indian Head Industries, Inc., Ingersoll-Dresser Pump, Ingersoll-Rand Corp., John Crane, Inc., The Lunkenheimer Co., Mortell Co., ACMC, F/H/A National Gypsum Co., North American Refractories Co., Norton Co., The Okonite Co., Owens-Corning Fiberglas Corp., Owens-Illinois, Inc., PPG Industries, Inc., Pilot Packing Co., Inc., The Rockbestos Co., Sherwin-Williams Co., Sika Corp., T&N Industries, Inc., W.S. Tyler, Inc., Union Carbide Corp., Uniroyal Chemical Co., United States Gypsum Co., USX Corp., Vellumoid, Inc., Walworth Co., Westinghouse Electric Corp. and E.J. Bartells Co.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. Is There No Way Out Of The Quagmire? 5

2. This Court Has Provided The Way Out 6

3. Only This Court Can End The Conflicts And Confusion In The Lower Courts 14

a. *Ryan* Implied Contractual Indemnity 14

b. Equitable Indemnity 22

CONCLUSION 27

APPENDICES 1a

TABLE OF AUTHORITIES

CASES **Pages**

Associated Elec. Coop., Inc. v. Mid-America Transp. Co., 931 F.2d 1266 (8th Cir. 1991) 10

Boca Grande Club, Inc. v. Florida Power & Light Co., 114 S. Ct. 1472 (1994) . . . . . passim

Bosnor, S.A. de C.V. v. Tug L.A. Barrios, 796 F.2d 776 (5th Cir. 1986) 29

Boykin v. Bergesen D.Y. A/S, 835 F. Supp. 274 (E.D. Va. 1993), *aff'd sub nom. Boykin v. China Steel Corp.*, 73 F.3d 539 (4th Cir. 1996) 23

Campbell Indus., Inc. v. Offshore Logistics Int'l, Inc., 816 F.2d 1401 (9th Cir. 1987) 18

Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426 (1st Cir. 1992) . . . 19, 20

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 16, 17, 23, 25, 27

Eagle-Picher Indus., Inc. v. United States, 937 F.2d 625 (D.C. Cir. 1991) 24

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 16

Exxon Co. v. Sofec, Inc., 54 F.3d 570 (9th Cir.), *cert. granted*, 116 S. Ct. 493 (1995) (No. 95-129) 13

Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975) 19

Farrell Lines, Inc. v. Carolina Shipping, Co., 509 F.2d 53 (4th Cir. 1975) 16, 20

Fitzgerald v. United States Lines, 374 U.S. 16 (1963) 28

Gator Marine Serv. Towing, Inc. v. J. Ray McDermott & Co., 651 F.2d 1096 (5th Cir. 1981) 19, 20

Getty Oil Co. v. SS Ponce de Leon, 555 F.2d 328 (2d Cir. 1977) 23

Geyer v. USX Corp., 896 F. Supp. 1440 (E.D. Mich. 1994) . . . 9, 20, 24, 26

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) . 15, 17, 21, 23, 27

Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992) 24

Hercules, Inc. v. Stevens Shipping Co., 698 F.2d 726 (5th Cir. 1983) (en banc) 20

Hurdich v. Eastmount Shipping Corp., 503 F.2d 397 (2d Cir. 1974) 29

In re Joint E. & S. Dist. Asbestos Litig.,
129 B.R. 710 (E. & S.D.N.Y. 1991),
vacated on other grounds, 982 F.2d 721
(2d Cir. 1992), *modified in part*, 993
F.2d 7 (2d Cir. 1993). 19

Italia Societa per Azioni di Navigazione v.
Oregon Stevedoring Co., 376 U.S.
315 (1964) 16, 17

Loose v. Offshore Navigation, Inc.,
670 F.2d 493 (5th Cir. 1982) 23, 24

Marathon Pipe Line Co. v. Drilling Rig
Rowan/Odessa, 761 F.2d 229
(5th Cir. 1985) 23

McCune v. F. Alioto Fish Co.,
597 F.2d 1244 (9th Cir. 1979) 18

McDermott, Inc. v. AmClyde,
114 S. Ct. 1461 (1994) . . . . . passim

Miller v. American President Lines,
989 F.2d 1450 (6th Cir.), *cert. denied*,
114 S. Ct. 304 (1993) 21, 25, 26

National Bulk Carriers, Inc. v. United States, 183 F.2d 405 (2d Cir.), *cert. denied*, 340 U.S. 865 (1950) 28

Oglebay Norton Co. v. CSX Corp., 788 F.2d 361 (6th Cir.), *cert. denied*, 479 U.S. 849 (1986) 18

Phillips Petroleum Co. v. Stokes Oil Co., 863 F.2d 1250 (6th Cir. 1988) 20

Rich v. United States Lines, 596 F.2d 541 (3d Cir. 1979) 20

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) . . . . . passim

Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855) 6, 22, 28

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 15, 20

Seguros "Illimani" S.A. v. M/V Popi P, 929 F.2d 89 (2d Cir. 1991) 20

Sigler v. Grace Offshore Co., 663 So.2d 212 (La. Ct. App. 1995) 9

Slattery v. Marra Bros., 186 F.2d 134 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951) 24

Smith & Kelly Co. v. The S/S Concordia Tadj, 718 F.2d 1022 (11th Cir. 1983) 18

SPM Corp. v. M/V Ming Moon,
22 F.3d 523 (3d Cir. 1994) 23

Stevens v. East-West Towing Co.,
649 F.2d 1104 (5th Cir. 1981),
cert. denied, 454 U.S. 1145 (1982) 20

Tebbs v. Baker-Whiteley Towing Co.,
407 F.2d 1055 (4th Cir. 1969) 19

United States v. Reliable Transfer Co.,
421 U.S. 397 (1975) . . . . . passim

United States Lines v. Newport News Shipbuilding & Dry Dock Co., 688 F.2d
236 (4th Cir. 1982) 24

Vaughn v. Farrell Lines,
937 F.2d 953 (4th Cir. 1991) 19, 23

Verrett v. McDonough Marine Serv.,
705 F.2d 1437 (5th Cir. 1983) 19, 20

Vickers v. Chiles Drilling Co.,
822 F.2d 535 (5th Cir. 1987) 26

White v. Johns-Manville Corp.,
662 F.2d 243 (4th Cir. 1981) 23

CONSTITUTION & STATUTES

U.S. CONST. art. III, § 2 2

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1333(1) 2

28 U.S.C. § 2101(c) 2

33 U.S.C. § 905(a) 15

33 U.S.C. § 905(b) 16

OTHER AUTHORITIES

2 Warren B. Daly, Jr. et al., *Benedict on Admiralty* (Aileen M. Jenner & Michael Rosenberg eds., 7th rev. ed. 1995) 25

Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 16

Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165 (1981) 11, 24, 26, 29

RESTATEMENT (SECOND) OF TORTS (1977) . . . 11, 12, 22

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994) 10, 15, 16

OPINIONS BELOW

The Plaintiff in this suit, Abdel H. Osman, filed suit on May 23, 1994 seeking to recover damages for injuries and diseases related to exposure to asbestos fibers during his service as a seaman on numerous American vessels. His amended complaint named three classes of defendants: shipowners, manufacturers of machinery containing asbestos, and manufacturers and suppliers of asbestos or asbestos products. Plaintiff made a claim against Babcock & Wilcox Company for supplying boilers containing asbestos to vessels on which Plaintiff had served. Plaintiff then settled his claims with Babcock & Wilcox and did not name Babcock & Wilcox in his suit. However, several of the shipowner Defendants thereafter filed a cross-complaint bringing Babcock & Wilcox into the lawsuit. The shipowners sought equitable indemnity, *Ryan*[1] indemnity, and contribution. The shipowners did not plead any claim of express contractual indemnity.

Babcock & Wilcox filed a Motion for Summary Judgment or, in the Alternative, for Summary Adjudication on the grounds that, as a result of the settlement, the contribution and indemnity claims asserted against Babcock & Wilcox in the cross-complaint were abrogated, as a matter of law, according to the decisions of this Honorable Court. On August 24, 1995, the Judge of the Superior Court denied Babcock & Wilcox' motion on the common-law indemnity claims but granted the motion on the contribution claim. The opinion is reproduced herein as Appendix A.

Babcock & Wilcox filed a Petition for Peremptory or Alternative Writ of Mandate in the Court of Appeal of the State of California, First Appellate District, Division One. On November 22, 1995, the Court of Appeal denied the writ. The Order, which is unreported, is reproduced herein as Appendix B.

---

[1] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

Babcock & Wilcox filed a Petition for Review in the Supreme Court of the State of California. On January 17, 1996, the court denied the Petition for Review (Cal. Minutes 1/17/96). The Order is reproduced herein as Appendix C.

JURISDICTION

The Order of the Supreme Court of California was filed on January 17, 1996. (Appendix C). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Petition for a Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the formulation of "flexible and fair remedies in the law maritime," whose responsibility has largely been left to this Court by Congress. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). That authority is derived from two sources:

> Article III, Section 2 of the United States Constitution provides, in pertinent part: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ."
>
> Section 1333 of 28 U.S.C. provides, in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT OF THE CASE

Plaintiff, Abdel H. Osman, was a career merchant seaman who spent most of his adult life (portions of five decades) serving on American vessels as they sailed throughout the world. He claimed that while serving as a crewmember of these vessels he was exposed to asbestos fibers which caused him to suffer pulmonary disease.

On May 23, 1994, Plaintiff filed his original complaint in the California Superior Court in and for the County of San Francisco. He filed amended complaints on October 17, 1994 and March 9, 1995. Plaintiff sought damages for asbestos exposure against three groups of defendants: his shipowner employers, the companies which manufactured machinery containing asbestos that was used on the vessels, and the companies who manufactured or supplied asbestos or asbestos products which were placed on vessels.

On July 29, 1994, Plaintiff entered into a settlement with Babcock & Wilcox Company and executed a Joint Tortfeasor Release--Personal Injury which extinguished Plaintiff's claim against Babcock & Wilcox for injury and/or sickness allegedly caused by exposure from products or components manufactured by Babcock & Wilcox which contained asbestos. Plaintiff did not name Babcock & Wilcox as a defendant in his suit.

On January 18, 1995, some of the shipowner Defendants, real parties in interest for Respondent herein,[2] filed a Cross Complaint for Indemnity and Contribution against certain Defendants and against some companies which were not named by the Plaintiff. One of the parties which

---

[2]The shipowner Defendants, which filed the cross-complaint against Petitioner Babcock & Wilcox, are the real parties in interest for Respondent, the Superior Court. The shipowner Defendants and Cross-complainants will hereinafter be referred to as Respondents or Cross-complainants.

was brought into the suit as a cross-defendant was Babcock & Wilcox. The cross-complaint sought contribution, equitable indemnity and *Ryan*[3] indemnity. Cross-complainants asserted that during Plaintiff's career as a seaman, he sailed aboard approximately twenty vessels equipped with boilers manufactured by Babcock & Wilcox. Cross-complainants did not plead any action for express contractual indemnity against Babcock & Wilcox.

Babcock & Wilcox filed a Motion for Summary Judgment or, in the Alternative, for Summary Adjudication, asserting that all of the indemnity and contribution claims were barred because of the settlement between the Plaintiff and Babcock & Wilcox which released Plaintiff's claims against Babcock & Wilcox. Cross-complainants responded that their contribution and indemnity claims were not barred because Babcock & Wilcox had not established the validity of the release. Regardless of the validity of the release, Cross-complainants contended they were still entitled to assert *Ryan* indemnity and equitable indemnity claims against a settling party. Cross-complainants also contended that Babcock & Wilcox should remain as a party to the contribution claim until its status as a tortfeasor and its share of fault were determined. Babcock & Wilcox responded with evidence of the validity of the release and by contending that the contribution and indemnity claims were no longer valid against a settling entity in view of this Court's adoption of the proportionate share rule in *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994) and *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 114 S. Ct. 1472 (1994).

The Superior Court granted Babcock & Wilcox' motion for summary adjudication as to the contribution claim, but denied summary adjudication of the indemnity claims. (Appendix A at 4a). Faced with the prospect of

---

[3]*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

being brought into thousands of suits that it had already settled, Babcock & Wilcox filed a Petition for Peremptory or Alternative Writ of Mandate with the Court of Appeal of the State of California, First Appellate District, to compel the Superior Court to dismiss the indemnity claims so as to avoid the hardship of undergoing the very trial that the decisions in *McDermott* and *Boca Grande* were designed to prevent. The Court of Appeal denied the Petition (Appendix B) and Babcock & Wilcox filed a Petition for Review with the California Supreme Court requesting that court rule, as a matter of law, that this Court's decisions in *McDermott* and *Boca Grande* apply to both contribution and indemnity claims so that the release in this case would operate as a complete bar to the cross-complaint. The California Supreme Court denied the Petition for Review (Appendix C). Babcock & Wilcox now petitions this Honorable Court to give full effect to the proportionate share rule adopted in *McDermott* by disallowing not just contribution claims but all common-law indemnity claims seeking to bring settling parties into maritime suits.

REASONS FOR GRANTING THE WRIT

1. Is There No Way Out Of The Quagmire?

Faced with tens of thousands of asbestos claims of merchant seamen because it sold boilers with asbestos to various shipowners, Babcock & Wilcox Company believed it had two options. It could avoid years of almost interminable litigation by settling with the plaintiffs at the outset or it could jump into the quagmire and litigate until it exhausted its resources and reached the point of declaring bankruptcy, as eleven asbestos defendants have already done. Babcock & Wilcox chose the first option and has settled more than 27,000 asbestos claims of merchant seamen.

Unfortunately, Babcock & Wilcox' settlement did not buy it peace from the morass of asbestos litigation. Despite the settlements, Babcock & Wilcox has been dragged into more than 8,000 asbestos suits by third-party actions brought by shipowners based on various common-law indemnity theories. The California courts have sanctioned this result by denying summary adjudication of the third-party claim in the case at bar, forcing Babcock & Wilcox to continue to litigate a case that it has settled.

The 27,000 asbestos cases are only the tip of the iceberg, however. Thousands of seamen are now filing hearing loss claims against shipowners and the manufacturers of boilers and other component parts on the vessels. Is Babcock & Wilcox prevented from entering into settlements with the plaintiffs because it will be brought back into every case? And what of the ordinary cases filed every day against only a handful of defendants? Is one defendant essentially prevented from settling because it will still have to litigate its liability to the end against all of the other defendants? This case ultimately presents the question whether a defendant can ever buy its way out of mass tort litigation (or any litigation) short of paying off not just the plaintiffs but every possible or potential tortfeasor as well.

2. This Court Has Provided The Way Out.

Over the past three decades this Court has charted a course which will encourage settlement, end the conflicts and confusion in the lower courts and establish a fair and uniform rule for allocation of liability in all maritime cases. The leading case on this voyage is *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). More than a century before *Reliable Transfer,* the Court issued its forward-looking decision in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855). Despite the reluctance at that time of the common law to permit contribution among

tortfeasors, this Court achieved a semblance of rough justice between the parties by dividing the damages in a collision equally between the guilty vessels. Subsequent developments in maritime law in the rest of the world, however, bypassed the Solomonic justice of the divided damages rule and left the United States out of harmony with the rest of the world. In this country, doctrines were developed, such as major-minor fault, to ameliorate some of the potential unfairness that an equal division of damages could have in cases of unequal fault.

When it was ultimately presented in *Reliable Transfer* with the question whether to replace the rule of divided damages or continue to apply band-aids like the major-minor fault rule, this Court stated: "But this escape valve, in addition to being inherently unreliable, simply replaces one unfairness with another. That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *Reliable Transfer,* 421 U.S. at 406. Noting that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime," *id.* at 409, the Court abandoned the divided damages rule (with its encrusted overlay of doctrines like major-minor fault) and adopted the rule that damages in collisions and strandings would be "allocated among the parties proportionately to the comparative degree of their fault." *Id.* at 411.

The course toward a uniform proportionate share rule did not end with *Reliable Transfer*. Recently, this Court faced the important task of applying the analysis from *Reliable Transfer* in a noncollision case which presented an issue similar to the case at bar--how to apportion fault when the plaintiff has settled with one of the potential tortfeasors. The lower courts had reached divergent results and had even allowed settling defendants to continue to sue and be sued despite their settlement with the plaintiff. In *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994), this Court

evaluated three possible approaches to determine "how a settlement with less than all of the defendants in an admiralty case should affect the liability of nonsettling defendants." *Id.* at 1464. Each of the options was analyzed in terms of three paramount considerations, "consistency with the proportionate fault approach of *Reliable Transfer*, promotion of settlement, and judicial economy." *Id.* at 1466-67 (citation omitted). One approach was pro tanto setoff with right of contribution against the settling defendant. The Court considered this "clearly inferior to the other two, because it discourages settlement and leads to unnecessary ancillary litigation." *Id.* at 1467. The Court also reasoned: "The settling defendant thereby loses the benefit of its favorable settlement. In addition, the claim for contribution burdens the courts with additional litigation." *Id.*

The other two options were pro tanto reduction without contribution and the proportionate share rule. Neither approach would permit a contribution action against the settling defendant. The Court found no clear advantage between the two rules on the important considerations of promotion of settlements and judicial economy. In choosing the proportionate share rule, the Court stated: "The proportionate share rule is more consistent with *Reliable Transfer*, because a litigating defendant ordinarily pays only its proportionate share of the judgment." *Id.*

Applying the proportionate share rule in the companion case, *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 114 S. Ct. 1472 (1994), this Court was presented with "the question whether, in an action against several alleged joint tortfeasors under general maritime law, the plaintiff's settlement with one defendant bars a claim for contribution brought by nonsettling defendants against the settling defendant." *Id.* The Court answered that, having adopted the proportionate share rule in *McDermott*, "actions for contribution against settling defendants are neither necessary nor permitted." *Id.*

In *McDermott* and *Boca Grande*, this Court was presented only with claims for contribution. Thus, the Court did not have to address directly the question whether any common-law indemnity claims can survive the proportionate fault analysis in *Reliable Transfer*. The case at bar squarely presents the issue whether the proportionate fault rule in *Reliable Transfer* and the proportionate share rule in *McDermott* should determine the liability of *all* potential defendants and tortfeasors, or whether all-or-nothing claims of equitable indemnity and *Ryan* indemnity should be permitted to modify the concept of proportionate fault.

As will be discussed below, the decisions from the lower courts across the country are in a state of utter chaos on the question whether to give full effect to the proportionate fault rule or to emasculate the rule with various indemnity theories that can be used to drag settling defendants back into litigation. In fact, after *McDermott* and *Boca Grande*, Petitioner Babcock & Wilcox has received diametrically opposed decisions on this precise point in cases from different states. While the California courts below denied summary adjudication on the indemnity theories, the United States District Court for the Eastern District of Michigan dismissed equitable indemnity claims against Babcock & Wilcox in *Geyer v. USX Corp.*, 896 F. Supp. 1440 (E.D. Mich. 1994). The court in *Geyer* was not, however, able to summarily dismiss the *Ryan* implied contractual indemnity claims. Although recognizing that "[t]he continuing viability of the *Ryan* doctrine is admittedly somewhat suspect," the district court did not believe it could "simply dismiss Supreme Court precedent as no longer good law." *Id.* at 1449 n.8. Other lower courts have issued decisions after *McDermott* and *Boca Grande* which summarily dismissed common-law indemnity claims when the purported indemnitor had settled or been dismissed from a case. *E.g., Sigler v. Grace Offshore Co.*, 663 So.2d 212, 214-15 (La. Ct. App. 1995). Some courts summarily

dismissed common-law indemnity claims even before *McDermott* and *Boca Grande*. *E.g.*, *Associated Elec. Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266, 1271 (8th Cir. 1991).

While the lower courts flounder in conflict, many commentators have stated that this Court's adoption of the proportionate fault rule should now lead to the elimination of *all* common-law indemnity actions. The following is a sampling:

> Indemnity is an all-or-nothing approach that should be applied sparingly and purposefully by the law. In contrast to contribution, which spreads the loss of a tort, indemnity concentrates the loss in one party. In the transactions involving shipping or offshore ventures, there is no reason, absent express agreement between the parties, to place this duty on one party to the exclusion of others.

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-18, at 219.

> The future development of maritime indemnity and contribution could be enhanced and clarified through adoption of the following suggestions.
>
> (1) Indemnity rights should be limited to situations where an express agreement so provides.
>
> (2) Contribution should be based upon principles of comparative fault. If one party is 100% at fault, then 100% of the damages should fall on that party. Otherwise, loss should be based upon the relative degrees of

> fault. . . .
>
> (3) Implied indemnity agreements should only be found where there is clear evidence establishing an intention that the parties bargained for one party to bear the entire loss.

Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165, 1195-96, 1197 (1981).

> In a state following comparative contribution, or contribution according to the comparative fault of the parties, contribution may tend to merge with indemnity, and the technical distinctions of indemnity may become less important. The all-or-nothing approach of indemnity is likely to become less desirable and some of the traditional bases for indemnity may be absorbed by contribution.

RESTATEMENT (SECOND) OF TORTS § 886A cmt. *l* on Subsection (4) (1977).

> *l. Relation to contribution--Future development.* The law of indemnity developed at an earlier time when contribution was not available. Its all-or-nothing remedy was thus the only relief available to a joint tortfeasor who had paid the full amount of the injury. Courts therefore were inclined to be ready to expand the list of situations in which indemnity might be granted. The list has come to include many situations in which the indemnitee was definitely at fault but not to as great an extent as the indemnitor--so that a decision between all and nothing would be made for all rather than nothing.

> With the advent and free availability of contribution, the nature of the problem has changed and the courts may have the opportunity of apportioning the financial responsibility between the parties. This may produce a gradual expansion of the situations covered by contribution, at the expense of indemnity. Indeed, in the growing number of jurisdictions that determine the equitable shares of the obligation for contribution on the basis of the comparative fault of the parties, it may well develop that the two remedies will merge into each other, and that proportionate contribution will be determined by the factfinder in accordance with the relative percentages of fault for the several parties. This would eliminate the occasion for some of the highly technical decisions that have been rendered in actions for indemnity.

Id. § 886B cmt. *l* (cross-reference omitted).

In summary, the decision of this Court in *McDermott* to apportion liability by proportionate fault has abrogated any basis for the continuing use of nonproportionate fault theories of common-law indemnity. Incorporating all bases for allocation of fault (except express contractual indemnity) into a uniform proportionate fault system will not only end the interminable asbestos claims against settling defendants but will accomplish all of the goals set out by this Court in *McDermott*: consistency with the proportionate fault approach in *Reliable Transfer*, promotion of settlement and judicial economy. Continuing to apply outmoded theories of common-law indemnity will violate all three of the paramount considerations articulated by this Court in *McDermott*. 114 S. Ct. at 1466-67.

Earlier in this Term, the Court granted a petition for a writ of certiorari in *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir.), *cert. granted*, 116 S. Ct. 493 (1995) (No. 95-129), to address the continued viability of doctrines like intervening and superseding cause in maritime collision cases in view of the adoption of the proportionate fault approach in *Reliable Transfer*. As amicus curiae, the Maritime Law Association of the United States argued that the adoption of comparative fault had "unshackled" the courts "from inflexible rules" so that liability may now be allocated "in accord with the comparative faults of all contributing interests." (Amicus Curiae Brief of the Maritime Law Association of the United States at 8). The Maritime Law Association concluded that application of the superseding cause doctrine "is irreconcilable with the comparative fault doctrine and directly contravenes the goal of a just and equitable allocation of damages of this uniform maritime rule." (*Id.* at 19). The same reasoning applies in the case at bar. Common-law indemnity doctrines are irreconcilable with the proportionate share rule and contravene the goal of a just, equitable and uniform allocation of damages. The decision below, allowing common-law indemnity actions to proceed against a settling party, is a major setback in this Court's voyage toward a fair and uniform proportionate share rule for assessing responsibility in maritime cases. Not only must Babcock & Wilcox litigate 8,000 suits in which it has previously settled with the Plaintiff, and not only must each maritime defendant hereafter wonder whether it can ever settle a case and buy its peace, but the judges of the lower courts must continue to flounder in the confused seas of the conflicting common-law indemnity theories.

This Court in *McDermott* and *Boca Grande* has shown the way out of the quagmire which confronts not only Babcock & Wilcox but other maritime defendants and the lower courts as well. The Court should unshackle the lower courts from inflexible all-or-nothing indemnity theories which

discourage settlements and should establish the proportionate share rule, deemed "superior" by this Court in *McDermott*, as the uniform rule for allocation of fault. Consequently, Petitioner respectfully prays that this Honorable Court grant its Petition for a Writ of Certiorari to establish a uniform proportionate share rule that permits defendants to settle with the plaintiff and buy their peace from common-law indemnity actions.

3. Only This Court Can End The Conflicts And Confusion In The Lower Courts.

The issues in this case have much broader application than the direct effect on the 8,000 actions seeking common-law indemnity which have been brought against Babcock & Wilcox. Regardless of the effect of the settlement in this case, Respondents can only assert common-law indemnity claims if such claims exist in the general maritime law. The parties devoted considerable briefing below to the issue whether equitable indemnity and *Ryan* implied contractual indemnity claims can be brought by vessel owners against the supplier of a product that allegedly caused an injury to a member of the crew of the vessel. The arguments illustrated that the lower courts are in a state of hopeless conflict and confusion. The only escape is for this Court to address the validity of common-law indemnity in admiralty claims.

a. *Ryan* Implied Contractual Indemnity

In order to avoid the rule from *Boca Grande* which bars contribution against settling parties based on the proportionate share rule, Respondents assert a claim of implied contractual indemnity against Petitioner based on this Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). This "lowly common law concept that was plucked from obscurity by the

United States Supreme Court in 1956 and given star billing" is "one of the most ambiguous and controversial concepts in all of admiralty law." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-8, at 190, 192 (2d ed. 1994).

It is easy to uncover the source of the confusion on the *Ryan* indemnity issue, but it does not begin with the decision in *Ryan*. First, the Court allowed longshoremen and harbor workers to bring the seaman's unseaworthiness action against the owner of the vessel on which they were injured. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Next, after subjecting the vessel owner to liability for unseaworthiness, the Court declined to allow the vessel owner any contribution from the worker's employer whose negligence contributed to the vessel's unseaworthiness. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). By holding the vessel owner liable but denying it contribution against the party which created the condition, the Court "painted itself into a corner." 1 Schoenbaum, *supra*, at 190.

Only four years after *Halcyon*, having rejected contribution based on comparative fault, and in the face of the employer's statutory immunity from the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), the Court granted the vessel owner full indemnity against the injured worker's employer based on a breach of an implied contractual warranty of workmanlike performance. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The Court bypassed the provision in the LHWCA granting the employer immunity by holding that the employer's liability did not arise "on account of" the employee's "injury or death" but from an independent warranty that was implied by law into the contract between the vessel owner and employer. *Id.* at 130, distinguishing 33 U.S.C. § 905(a).

The *Sieracki-Ryan* triangle allowed a longshoreman to collect compensation from his employer and then bring a tort

suit against the vessel owner which transferred the liability back to the employer. "A round robin was created that unnecessarily drove up transaction costs and created a windfall for longshoremen (and their attorneys)." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-8, at 192 (2d ed. 1994). To make matters worse, because *Ryan* was based on a judicially implied warranty, principles of comparative fault were inapplicable. Thus, "the shipowner's negligence, whether active or passive, primary or secondary," did not prevent the shipowner from recovering full indemnity. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 321 (1964); *see, e.g., Farrell Lines, Inc. v. Carolina Shipping Co.*, 509 F.2d 53, 54 (4th Cir. 1975) (a shipowner which was found twenty-five percent negligent recovered one hundred percent indemnity under *Ryan*).

The decision in *Ryan* was criticized from its inception. The "nullification" of the exclusive liability provisions of the LHWCA "has been almost universally condemned in the professional literature," Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 6-56, at 446 (2d ed. 1975). In the situation where it was created (the longshoreman - vessel owner - employer triangle), *Ryan* was expressly overruled by Congress in 1972. 33 U.S.C. § 905(b); *see Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979). Moreover, in 1974, the Court held that contribution was generally available between tortfeasors in noncollision cases. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). This contribution is now based on comparative fault so that each party bears only its proportionate share of the responsibility for an injury. *McDermott*, 114 S. Ct. at 1467. Thus, the underpinnings for *Ryan's* decision to apply indemnity in the situation where there was no contribution have been eliminated, not only because contribution is now available in most cases, but because tortfeasors are

responsible only for their proportionate share. Under *McDermott*, Respondents should have no indemnity claim because they are only liable for their proportion of the causative fault. Any need that may have existed for common-law indemnity has been eliminated by *Fritz Kopke* and *McDermott*.

While any need for *Ryan* has been eliminated by the adoption of the proportionate share rule, the Court should not allow *Ryan* to continue to exist as a harmless relic of the past. Besides causing confusion and conflicts in the lower courts, the application of *Ryan* in many cases runs directly afoul of the proportionate share rule and will lead to a continuing lack of uniformity. As Respondents repeatedly pointed out below, *Ryan* allows complete indemnity to be awarded to the shipowner regardless of whether the shipowner was negligent. *Italia Societa per Azioni di Navigazione*, 376 U.S. at 321. Therefore, a shipowner which is assessed twenty-five percent responsibility may be able to recover one hundred percent indemnity under *Ryan*. *Farrell Lines*, 509 F.2d at 54. Such a result is not sanctioned by *McDermott*, which requires each party to bear its proportionate fault and not that of another defendant.

The problem now plaguing the lower courts is that it took forty-two years after *Halcyon* before *McDermott* established the proportionate share rule. In the intervening period the damage had already been done. Theories of all-or-nothing indemnity had been devised to overcome the bar to contribution between tortfeasors, and the *Ryan* warranty had spread beyond the original triangle where it has now been legislatively overruled.

The criticism and overruling of *Ryan* and the elimination of the *Halcyon* bar to contribution left the lower courts in a quandary. Because this Court has not been presented with the opportunity to revisit *Ryan* after *Fritz Kopke* and *McDermott*, the lower courts do not know whether to continue to apply *Ryan*, expand it or contract it.

The result has been that the circuit courts are not only in utter conflict with each other, they are also in conflict internally over the continued existence and application of *Ryan*. What follows is a small sample of some of the conflicts in the application of *Ryan*:

One issue in the courts below was whether *Ryan* has been extended from its original triangle to encompass injuries to seamen. Some conflicting decisions are:

No *Ryan*: *Ryan* indemnity does not apply "to controversies involving seamen injured at sea." *Smith & Kelly Co. v. The S/S Concordia Tadj*, 718 F.2d 1022, 1028 (11th Cir. 1983).

Ryan applies: Rationale of *Ryan* still applies to injury of a seaman. *Campbell Indus., Inc. v. Offshore Logistics Int'l, Inc.*, 816 F.2d 1401, 1404-05 (9th Cir. 1987).

Ryan applies: *Ryan* still applies to injury of a seaman. *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 364 n.5 (6th Cir.), *cert. denied*, 479 U.S. 849 (1986).

Another issue below was whether *Ryan* indemnity has been extended from the original triangle to encompass the claim of a shipowner against the manufacturer of a component part. Some conflicting decisions are:

No *Ryan*: Defective product (winch) as opposed to unworkmanlike services "does not give rise to a *Ryan*-type warranty." *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1251 (9th Cir. 1979).

No *Ryan*: *Ryan*-type indemnity refused for shipowners' indemnity action against manufacturers of asbestos and boilers. *Vaughn v. Farrell Lines*, 937 F.2d 953, 956 n.4 (4th Cir. 1991).

Ryan applies: Shipowners may seek *Ryan* indemnity from asbestos manufacturers. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 789 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified in part*, 993 F.2d 7 (2d Cir. 1993).

The application of *Ryan* has led to many other conflicts among the lower courts. A few examples are:

No *Ryan* In Towage Contract: *Verrett v. McDonough Marine Serv.*, 705 F.2d 1437, 1443 (5th Cir. 1983).

Ryan Applies In Towing Contract: *Tebbs v. Baker-Whiteley Towing Co.*, 407 F.2d 1055, 1058 (4th Cir. 1969).

Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252, 1261 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975).

No *Ryan* For Cargo Damage: *Gator Marine Serv. Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096, 1100 (5th Cir. 1981).

Continental Grain Co. v. Puerto Rico Maritime Shipping Auth., 972 F.2d 426, 439 (1st Cir. 1992).

Phillips Petroleum Co. v. Stokes Oil Co., 863 F.2d 1250, 1256-57 (6th Cir. 1988).

Ryan Applies To Cargo Damage: *Seguros "Illimani" S.A. v. M/V Popi P*, 929 F.2d 89, 92-93 (2d Cir. 1991).

Even within the circuits, the opinions have yielded varying results. For example, in *Stevens v. East-West Towing Co.*, 649 F.2d 1104 (5th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), one panel of the Fifth Circuit broadly applied *Ryan* "to all towing operations including preparations necessary and incident to the actual moving of the barge." *Id.* at 1109. Only two years later, however, the court criticized the application of *Ryan* to towing contracts in *Hercules, Inc. v. Stevens Shipping Co.*, 698 F.2d 726, 737 n.25 (5th Cir. 1983) (en banc). Subsequently, another panel of the court found no basis for the application of *Ryan* to towing contracts. *Verrett v. McDonough Marine Serv.*, 705 F.2d 1437, 1443 (5th Cir. 1983).

In addition to its criticism from the commentators, the confusion and conflict in its application, and its legislative overruling on its facts, *Ryan* has been described by the courts as "withered" and "outmoded." *Gator Marine*, 651 F.2d at 1100; *Continental Grain*, 972 F.2d at 439. Further, the *Sieracki-Ryan* triangle has "contributed to the generally depressed state of the maritime industry in the United States." *Rich v. United States Lines*, 596 F.2d 541, 546 (3d Cir. 1979). Nonetheless, the lower courts "cannot simply dismiss Supreme Court precedent as no longer good law." *Geyer*, 896 F. Supp. at 1449 n.8; *see also Farrell Lines*, 509 F.2d at 54 ("[A]ny reversal or change in the scope of *Ryan* . . . should come from the Supreme Court and not from an intermediate court."). It is no wonder that the California courts below could not and would not make a ruling on the

application of *Ryan* indemnity. As Respondents argued below, the California courts simply were not in a position to correct the situation: "A decision by the California Supreme Court, no matter how enlightening, could not settle or govern decisional law regarding indemnity and the proportionate share rule in federal or state cases where California law did not apply." (Respondents' Answer to Petition for Review in the Supreme Court of California at 3).

While neither the California courts nor the federal circuit courts across the country are in a position to correct the conflicts among the lower courts, this Court can and should establish a uniform rule to end the confusion stemming from the decisions in *Halcyon* and *Ryan*. There is no reason why this Court's proportionate share rule from *McDermott* cannot be applied to *any* situation, regardless of whether the parties' responsibility is based on negligence, strict liability, unseaworthiness or any other theory. "Courts and jurors are fully capable of weighing the relative responsibility of strictly liable defendants against that of negligent defendants." *Miller v. American President Lines*, 989 F.2d 1450, 1461 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993). Applying the uniform proportionate share rule, Respondents will be held liable only for their share of the fault and not for the fault of Babcock & Wilcox. Having settled its proportionate share, no one else can be liable for that share and there is no reason for Babcock & Wilcox to remain in the case. *Boca Grande*, 114 S. Ct. at 1472.

The time has come to give full meaning to the principles enunciated by this Court in *McDermott* and *Reliable Transfer*, to eliminate any vestiges of *Ryan's* inequity that were not overruled by Congress, to end the confusion and conflicts in the lower courts, and to establish a fair and uniform proportionate share rule in all admiralty cases. Therefore, Petitioner respectfully prays that this Court jettison *Ryan* and its implied contractual indemnity and

establish a uniform proportionate share rule in all maritime cases.

b. Equitable Indemnity

The second common-law theory asserted by Respondents does not purport to have an implied contractual basis but is grounded on equitable indemnity. As with the *Ryan* theory, there is no longer any need for equitable indemnity in view of the proportionate share rule for determining maritime liability.

"The law of indemnity developed at an earlier time when contribution was not available. Its all-or-nothing remedy was thus the only relief available to a joint tortfeasor who had paid the full amount of the injury." RESTATEMENT (SECOND) OF TORTS § 886B cmt. *l* (1977). In admiralty, all-or-nothing indemnity theories arose in two different contexts, collision cases and noncollision cases.

In collision cases, this Court modified the common-law no-contribution rule in 1855 in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855). By adopting the divided damages rule, the Court allocated damages in a maritime collision equally between the guilty vessels. This solution was unfair, however, when the relative degrees of fault were not equal and when one vessel was more substantially at fault than the other vessel. In order to ameliorate the harshest applications of the divided damages rule, the courts developed all-or-nothing doctrines like the major-minor fault rule whereby a grossly negligent party would pay all of the damages and the slightly negligent vessel would be excused from any liability at all. A century later, when *Reliable Transfer* replaced the divided damages rule with a proportionate fault rule, the Court indicated its disagreement with all-or-nothing doctrines like the major-minor fault rule, which "simply replaces one unfairness with another." *Reliable Transfer,* 421 U.S. at 406.

Consequently, many lower courts have "read *Reliable* as a rejection not only of divided damages but as a repudiation of its illicit progeny, the major-minor approach." *Getty Oil Co. v. SS Ponce de Leon*, 555 F.2d 328, 333 (2d Cir. 1977).

In the noncollision context, the Court in *Halcyon* initially declined to extend the divided damages rule to allow contribution to an owner of a vessel against a contractor whose negligence contributed to the injuries sustained by its employee on the vessel. However, it took less than half a century for the Court to recognize the right of contribution in noncollision cases in *Fritz Kopke* and then determine that allocation of fault should be based on the proportionate share rule in *McDermott*. Now that the Court has abandoned the limitations on contribution which engendered all-or-nothing indemnity rules, the time has come for the Court to eliminate the illicit indemnity progeny of the pre-*McDermott* era in favor of a uniform proportionate share approach in noncollision cases.

As with *Ryan* indemnity, the lower courts have struggled with equitable indemnity theories and have reached confusing and conflicting results. Some courts have recognized equitable indemnity on an active-passive theory by which a party guilty of active negligence must indemnify a party guilty of passive negligence. *E.g., SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526 (3d Cir. 1994); *Boykin v. Bergesen D.Y. A/S*, 835 F. Supp. 274, 287 (E.D. Va. 1993), *aff'd sub nom. Boykin v. China Steel Corp.*, 73 F.3d 539 (4th Cir. 1996). Other courts have expressly rejected the active-passive approach. *E.g., Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 499-502 (5th Cir. 1982). Equitable indemnity has been granted against a boiler supplier, *Vaughn v. Farrell Lines*, 937 F.2d 953, 957 (4th Cir. 1991), and a manufacturer, *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa*, 761 F.2d 229, 236 (5th Cir. 1985), but has been denied against a shipyard, *White v. Johns-Manville Corp.*, 662 F.2d 243, 248-50 (4th Cir.

1981), and an offshore oil and gas operator, *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 (5th Cir. 1992). Some courts have defined equitable indemnity in terms of a vicariously liable tortfeasor obtaining indemnity from the tortfeasor guilty of actual fault. *E.g., Loose*, 670 F.2d at 502 n.18. Another has rejected such indemnity based on vicarious liability when the potential indemnitor has settled with the plaintiff. *Geyer*, 896 F. Supp. at 1448. One point is clear, however. Equitable indemnity theories are "overlaid with a pretty heavy thicket" and the decisions and rationale supporting equitable indemnity "are not always consistent." *United States Lines v. Newport News Shipbuilding & Dry Dock Co.*, 688 F.2d 236, 240 (4th Cir. 1982).

There can be no doubt that the purported reason which was given to justify the creation of common-law indemnity theories was that contribution and indemnity are based on different principles and stand on different footings. Different theoretical analyses had to be articulated in order to create common-law indemnity theories, or the transfer of liability from one tortfeasor to another would have violated the no-contribution rule. Now that the prohibition against contribution has been eliminated, however, the courts and commentators have recognized common-law indemnity for what it really is: "Indemnity is an all-or-nothing remedy that shifts the entire loss from one tortfeasor to another and, thus, is 'an extreme form of contribution.'" Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165, 1166 (1981) (footnote omitted), quoting *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951). One court dismissed equitable indemnity as "not an indemnity theory at all, but rather a contribution theory." *Eagle-Picher Indus., Inc. v. United States*, 937 F.2d 625, 637 (D.C. Cir. 1991). The court concluded: "Declining any invitation to a label-based formalism, we recognize GAF's 'indemnity' claim as a claim for contribution--one, as demonstrated above, that is barred

by statutory and common law." *Id.*

The decisions of this Court in *Fritz Kopke*, *Reliable Transfer* and *McDermott* chart a voyage which can only be completed by jettisoning all common-law indemnity theories so that the admiralty law will sail on the uniform waters of the proportionate share rule. There is no longer any basis for the confusing distinctions and conceptualizations which were engendered by the label-based formalism necessary to avoid the common-law bar against contribution. Many courts have accepted the challenge and have changed course from equitable indemnity to contribution based on comparative fault in order to comply with the principles enunciated by this Court in *Reliable Transfer* and reiterated in *McDermott*. "A growing number of both federal and state courts recognize that comparative negligence principles are more in harmony with general admiralty law than 'active/passive' negligence concepts." 2 Warren B. Daly, Jr. et al., *Benedict on Admiralty* § 13, at 1-71 (Aileen M. Jenner & Michael Rosenberg eds., 7th rev. ed. 1995).

The case at bar presents no obstacles to adoption of a uniform proportionate share rule. In fact, the differing theories of liability in this case (unseaworthiness of the vessel and strict liability of the boiler supplier) make this case a particularly appropriate one for this Court to consider and apply the proportionate share rule. For example, in *Miller v. American President Lines*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993), the Sixth Circuit addressed the question (similar to that in the present case) of how to assess liability between shipowners and asbestos manufacturers. The court of appeals rejected common-law indemnity in favor of the shipowners and adopted a comparative causation approach for apportioning damages. *Id.* at 1459. Thus, the court faced the conceptual problem which confounded the lower courts in the present case--how to compare strict liability and negligence in a comparative fault system. *Id.* at 1461. The *Miller* court did not find that

it was "conceptually impossible, or even impractical" to compare theories such as negligence and strict liability. 989 F.2d at 1461. The court noted that maritime courts have for years applied comparative fault to unseaworthiness claims, and this comparison "appears to have posed little problem in cases tried by juries." *Id.* at 1462; *see, e.g., Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 539-40 (5th Cir. 1987) (case remanded to apportion causation among the negligent plaintiff, the negligent vessel owner and unseaworthy vessel, the strictly liable manufacturer, and the negligent equipment owner and to reduce the plaintiff's award against the nonsettling defendant by the percentage attributable to the settling defendants and the plaintiff).

The proportionate share rule from *McDermott* applies regardless of the theory of liability and regardless of whether the allocation results in one party's comparative causation being zero percent and the other party's being one hundred percent. For example, if Respondents' negligence or unseaworthiness contributed one percent to Plaintiff's injuries, Respondents should pay one percent of Plaintiff's damages under *McDermott*. In comparison, if Babcock & Wilcox' fault or liability were the one hundred percent cause of Plaintiff's injuries and if the unseaworthiness of Respondents' vessels were ruled purely vicarious and assessed at zero percent causation, then Plaintiff would be awarded nothing against Respondents. *Geyer v. USX Corp.*, 896 F. Supp. 1440, 1448 (E.D. Mich. 1994). "If one party is 100% at fault, then 100% of the damages should fall on that party." Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165, 1196 (1981). Applying the proportionate share rule from *McDermott*, Plaintiff would have settled the one hundred percent share of Babcock & Wilcox and would have taken the risk of a zero percent verdict against Respondents.

There is simply no need to create artificial distinctions and inequitable theories to supplement the rule determined by

this Court in *McDermott* to be the fairest rule, that comports most closely with the policies of judicial economy, promotion of settlement and consistency with the proportionate fault approach in *Reliable Transfer*. *McDermott*, 114 S. Ct. at 1466-67. Just as all-or-nothing doctrines like major-minor fault have not survived the proportionate fault rule in *Reliable Transfer* for collision cases, so too should all-or-nothing theories like equitable indemnity fail to survive the proportionate share rule in *McDermott* for noncollision cases. Therefore, Petitioner respectfully prays that this Court eliminate equitable indemnity doctrines in maritime cases in favor of a uniform rule that all parties are responsible for the proportionate share of the damages caused by their fault or other liability.

CONCLUSION

The parallel between the present case and *Reliable Transfer* is striking. After the *Halcyon* decision in 1952, this Court and the lower courts adopted all-or-nothing rules of indemnity to avoid the harsh effect of a no-contribution rule. Subsequently, in *Fritz Kopke*, contribution became available in maritime noncollision cases and, after *McDermott* and *Boca Grande*, each party became responsible only for its proportionate share, regardless of settlements. The problem now is what to do with the doctrines that were created to avoid a rule which was subsequently discarded.

Commentators and courts have criticized all-or-nothing indemnity rules, and the case establishing implied contractual indemnity, *Ryan*, has been overruled by Congress. "There can be no question that subsequent history and experience have conspicuously eroded" the foundations of doctrines which artificially allocate fault in portions which do not equate to the actual liability of the parties. *Reliable Transfer*, 421 U.S. at 403 (footnote omitted). It can be just as unfair to make one party pay all of the damages as it was

to divide the damages equally under the rule of *The Schooner Catharine v. Dickinson*. "That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *Reliable Transfer*, 421 U.S. at 406.

The indemnity doctrines established by the common law were an "escape valve," *id.*, "in the nature of a sop to Cerberus." *Id.* at 406-07, quoting *National Bulk Carriers, Inc. v. United States*, 183 F.2d 405, 410 (2d Cir.) (L. Hand, J., dissenting), *cert. denied*, 340 U.S. 865 (1950). After *Reliable Transfer* and *McDermott*, common-law indemnity doctrines are unnecessary and unwarranted. Except in the case of express contractual indemnity (which has not been pled in this case), the responsibility among all parties in maritime cases should be based on their proportionate share. When one party settles, it has settled its proportionate share only and there is no shortfall to be allocated to other defendants who pay only their own proportionate share. *McDermott*, 114 S. Ct. at 1471-72. "Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement . . . so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one." *Id.* at 1472. Therefore, just as the settling party was insulated from further contribution actions in *Boca Grande*, so too should the settling party be insulated from common-law indemnity actions.

"Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Reliable Transfer*, 421 U.S. at 409, quoting *Fitzgerald v. United States Lines*, 374 U.S. 16, 20 (1963). The courts and commentators have forecast this moment:

> The inflexibility of application of the *Ryan* doctrine was a product of the blanket prohibition against contribution in noncollision

> cases. The disappearance of that prohibition should presage the development of a more equitable and realistic approach toward dividing the burden between parties who are mutually at fault.

Hurdich v. Eastmount Shipping Corp., 503 F.2d 397, 403 (2d Cir. 1974).

> Underlying policy considerations of uniformity and fairness also support application of comparative fault principles rather than the all or nothing approach of *Ryan*.

Bosnor, S.A. de C.V. v. Tug L.A. Barrios, 796 F.2d 776, 786 (5th Cir. 1986).

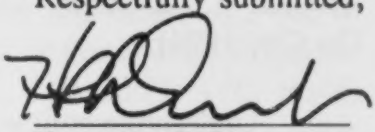
> Where the parties have not expressly agreed on how to allocate the loss, the courts should apply contribution among tortfeasors based upon principles of comparative fault.

Francis J. Gorman, *Indemnity and Contribution Under Maritime Law*, 55 Tul. L. Rev. 1165, 1199 (1981).

As in *Reliable Transfer* and *McDermott*, it is time to abandon inequitable theories for apportionment of liability that are not based on each party's proportionate share of liability. The application of a uniform proportionate share rule will resolve the conflicts in the lower courts, end the confusion and provide certainty to settlements. This Court should now jettison the indemnity theories that have brought Babcock & Wilcox into this case, not just because Babcock & Wilcox faces 8,000 similar common-law indemnity claims despite settling with the plaintiffs, but because only this Court can end the conflict and confusion in the lower courts.

WHEREFORE, Petitioner, Babcock & Wilcox Company, respectfully prays that this Honorable Court grant its Petition for a Writ of Certiorari to complete the job of establishing a uniform proportionate share rule for allocation of fault and effectuating settlements in maritime cases.

Respectfully submitted,



KENNETH G. ENGERRAND
Counsel of Record
One Post Oak Central
2000 Post Oak Boulevard
Suite 2100
Houston, Texas 77056
Telephone (713) 629-1580
Telecopier (713)629-5027

Attorney for Petitioner, Babcock & Wilcox Company

Of Counsel:

BROWN, SIMS, WISE & WHITE
One Post Oak Central
2000 Post Oak Boulevard
Suite 2100
Houston, Texas 77056-4496

APPENDICES
Index

Appendix A. Order of the Superior Court
Dated August 24, 1995 . . . . . A-1

Appendix B. Order of the California Court
of Appeal
Dated November 22, 1995 . . . . . B-1

Appendix C. Order of the California Supreme
Court
Filed January 17, 1996 . . . . . C-1

APPENDIX A

GRAHAM & JAMES
ANDREW I. PORT (S.B. #120977)
MARGARET P. BAKER (S.B. #103370)
ERIC M. DANOFF (S.B. #60915)
One Maritime Plaza, Suite 300
San Francisco, CA 94111-3492
Telephone: (415) 954-0200

Co-Counsel:
THOMPSON, HINE AND FLORY
RICHARD BINZLEY, ESQ.
HAROLD HENDERSON, ESQ.
PAMELA ZARLINGO, ESQ.
1100 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114
Telephone: (216) 566-5500

Attorneys for Defendants/
Cross-Complainants, Matson
Navigation Company, Watters
Marine, Inc., Weyerhaeuser
Company (improperly named as
F. E. Weyerhaeuser), Heublein,
Inc. (as successor in interest
to United Vintners, Inc.),
American President Lines, Ltd.,
West Coast Shipping Company and
Mobil Oil Corporation

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN FRANCISCO

ABDEL H. OSMAN, Plaintiff, vs. MATSON NAVIGATION COMPANY, INC., et al., Defendants. _____ MATSON NAVIGATION COMPANY, INC., WATTERS MARINE, INC., WEYERHAEUSER COMPANY (improperly named as F.E. WEYERHAEUSER), HEUBLEIN, INC. (as successor in interest to	) CASE NO. 961120))))) ORDER ON) CROSS-DEFENDANT,) THE BABCOCK &) WILCOX COMPANY'S) MOTION FOR SUMMARY) JUDGMENT OR, IN THE) ALTERNATIVE, FOR) SUMMARY) ADJUDICATION))) Date: August 21, 1995) Time: 9:30 a.m.) Dept. 10) Trial Date: None)))

UNITED VINTNERS, INC., AMERICAN PRESIDENT LINES, LTD., WEST COAST SHIPPING COMPANY and MOBIL OIL CORPORATION,

Cross-Complainants,

vs.

GENERAL ELECTRIC COMPANY, OWENS-ILLINOIS, INC., TURNER & NEWALL, P.L.C., BABCOCK & WILCOX COMPANY, PITTSBURGH CORNING CORPORATION, FOSTER WHEELER COMPANY, GAF CORPORATION, RAYBESTOS-MANHATTAN, SHOOK & FLETCHER WESTINGHOUSE ELECTRIC CORPORATION, DELAVAL TURBINE DIVISION IMO INDUSTRIES, INC., H.K. PORTER COMPANY, INC., OWENS-CORNING FIBERGLAS CORP., COMBUSTION ENGINEERING, INC., ACANDS, INC., and ARMSTRONG WORLD INDUSTRIES, INC., and ROES 1 through 100,

Cross-Defendants.

ORDER

This matter, came before the Court on August 21, 1995 pursuant to Cross-Defendant, The Babcock & Wilcox Company's ("B&W") Motion for Summary Judgment or, in the Alternative, for Summary Adjudication. Appearances were made by Stephen Brooks, Esq. of Anderson Galloway & Lucchese on behalf of B&W and Harold Henderson, Esq. of Thompson Hine & Flory on behalf of Cross-complainants Matson Navigation Company,

Watters Marine, Inc., Weyerhaeuser Company (improperly named as F.E. Weyerhaeuser), Heublein, Inc. (as successor in interest to United Vintners, Inc.), American President Lines, Ltd., West Coast Shipping Company and Mobil Oil Corporation ("Cross-complainants"). The Court having considered the moving papers submitted by B&W, the opposition submitted by Cross-complainants, argument of counsel, and having reviewed its own file and having decided this matter on its merits, rules as follows:

IT IS HEREBY ORDERED that B&W's Motion for Summary Adjudication of the First and Second Causes of Action in Cross-complainants' complaint are denied as B&W has failed to demonstrate that it is entitled to summary adjudication of these issues as a matter of law. B&W's Motion to [sic] For Summary Adjudication as to the Third Cause of Action in Cross-Complainants' Complaint is granted.

Dated: 8/24/95 /s/
THE HONORABLE DAVID GARCIA

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION ONE

BABCOCK & WILCOX COMPANY,
v.
SAN FRANCISCO COUNTY SUPERIOR COURT,
MATSON NAVIGATION COMPANY, INC., ET AL.

Court of Appeal No. A071650
San Francisco Co. No. 961120

BY THE COURT:

The application of attorney Harold Wayne Henderson to be admitted to appear as counsel pro hac vice for real parties in interest is granted.

The petition for writ of mandate and request for stay are denied.

Dated: NOV 22 1995 STRANKMAN, P.J. P.J.

APPENDIX C

First Appellate District,
Division One, No. A071650
S050385

IN THE SUPREME COURT OF CALIFORNIA

BABCOCK & WILCOX COMPANY, Petitioner

v.

SAN FRANCISCO COUNTY SUPERIOR COURT, Respondent
MATSON NAVIGATION COMPANY Et Al.,
Real Parties In Interest

Application for stay and petition for review DENIED.

SUPREME COURT
FILED
JAN 17 1996
Robert Wandruff, Clerk

LUCAS
Chief Justice

DEPUTY